



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 17-03377
)
Applicant for Security Clearance)

Appearances

For Government: Andrew W. Henderson, Esq., Department Counsel
For Applicant: *Pro se*, Esq.

04/11/2018

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline H, drug involvement. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On October 13, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H, drug involvement and substance misuse. The DOD acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

On November 6, 2017, Applicant answered the SOR and requested a hearing. The case was assigned to me on December 12, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 13, 2017, and the

hearing was held on January 19, 2018. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A through C, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on January 29, 2018.

Findings of Fact

In Applicant's answer, he admitted SOR allegations ¶¶ 1.a and 1.b, but denied 1.c. I adopt his admissions as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 59 years old. He is married and has two children, ages 19 and 15. He has worked for his current employer, a defense contractor, since June 2016. He has a bachelor's degree. He has never held a security clearance.¹

The SOR alleges Applicant used and purchased marijuana, with varying frequency, from 1974 to April 2016. It also alleges his wife continues to use marijuana, which she grows on their property.

Applicant began using marijuana when he was 16 years old, while he was in high school. He continued his use and purchase of marijuana over the course of 42 years. Most of his use and purchase of marijuana was illegal. In approximately 2013, purchase and use of marijuana in his state of residence became legal. He describes his use as "intermittent," meaning that sometimes he would go for years without using marijuana. During his background investigation, he described his use as once or twice monthly. He avoided using marijuana around his children, but he is not certain whether they are aware of his use of marijuana. He stopped using marijuana when he was hired by his current employer in June 2016. His current employer has a drug-free policy. He claims he has not used or purchased marijuana since the spring of 2016, before he was hired for his current position. When asked about his future intent to use marijuana, he stated that as long as it was prohibited while holding a security clearance, he would not use marijuana. He did not completely rule out future use, although he claims marijuana is not a big part of his life.²

Applicant stated during his background investigation that his wife used marijuana. He also stated that they grew a marijuana plant at their home for several months, but when he was hired for his current position, he gave away the plant. They no longer have any marijuana plants growing on their property. His wife provided a written statement corroborating that fact.³

¹ Tr. at 5, 16-17; GE 1.

² Tr. at 19, 21-22, 27-29; GE 2.

³ Tr. at 18-19, 21, 26; GE 2; AE A-C.

Applicant did not provide any character references. He admitted his drug use when filling out his security clearance application (SCA) and during his background investigation. In his SCA he stated, "I have enjoyed it in small amounts in the past and I hope that someday it will no longer be a controlled substance."⁴

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

⁴ GE 1-2.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement and Substance Abuse

AG ¶ 24 expresses the security concern pertaining to drug involvement: “The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any “controlled substance” as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.”

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

(a) any substance misuse; and

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used and purchased marijuana on numerous occasions between 1974 and 2016. He grew a marijuana plant at his home for several months in 2016. I further find both disqualifying conditions apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used; and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant's use and purchase of marijuana was frequent and given his long-term pattern of use, his claimed abstinence beginning in 2016, is not sufficiently attenuated to be considered remote. From 1976 to 2013, his use and purchase of marijuana constituted criminal conduct under state law, which he admitted. His use and purchase through 2016, was always a violation under federal law. He did not provide a signed statement of intent abstaining from all future illegal drug use, which acknowledged any future misuse would be grounds for revocation of his security clearance. Applicant's claimed abstinence is insufficient to convince me that recurrence is unlikely. His frequency of past use casts doubt upon his current reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) and 26(b) do not apply. Applicant provided sufficient evidence that he no longer grows marijuana at his home and that his wife no longer uses marijuana as alleged in the SOR.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered that Applicant voluntarily disclosed his lengthy marijuana history. However, I also considered that he purchased and used marijuana on numerous occasions over a forty-year period. These uses and purchases were illegal.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge